

IN THE IOWA SUPREME COURT  
NO. 17-1934

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MANDI MUMM,  
Plaintiff-Appellant,  
vs.

JENNIE EDMUNDSON MEMORIAL HOSPITAL, d/b/a METHODIST  
JENNIE EDMUNDSON HOSPITAL, EMERGENCY PHYSICIANS OF  
WESTERN IOWA, L.L.C. and PAUL C. MILERIS, M.D.,  
Defendants-Appellees.

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**RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF  
THE DECISION OF THE IOWA COURT OF APPEALS  
OF OCTOBER 10, 2018**

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**RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF  
DEFENDANTS-APPELLEES EMERGENCY PHYSICIANS OF  
WESTERN IOWA, L.L.C. AND PAUL C. MILERIS, M.D.  
AND REQUEST FOR ORAL ARGUMENT**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES ..... 3

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 4

DISAGREEMENT WITH STATEMENT SUPPORTING FURTHER  
REVIEW ..... 4

DISAGREEMENT WITH STATEMENT OF THE FACTS..... 7

ARGUMENT ..... 8

CONCLUSION..... 11

REQUEST FOR ORAL ARGUMENT ..... 11

CERTIFICATE OF COMPLIANCE..... 12

CERTIFICATE OF COST..... 12

PROOF OF SERVICE AND CERTIFICATE OF FILING ..... 12

JURY VERDICT FORM ..... 14

**TABLE OF AUTHORITIES**

Deboom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009) ..... 5

Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000)..... 8, 11

Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017) ..... 5

Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 110 (Iowa 1986) 9

Huff v. Aulman, 28 N.W. 440, 442 (Iowa 1886)..... 9

McConnell v. Aluminum Co. Of America, 367 N.W.2d 245 (Iowa 1985).... 8

Mumm v. Jennie Edmundson Memorial Hospital, 2018 WL 4923164, \*1 (Iowa Ct.App.) ..... 4, 8, 9

Rivera v. Woodward Resource Center, 865 N. W.2d 887 (Iowa 2015)..... 5

Schwennen v. Abell, 471 N.W.2d 880, 887 (Iowa 1991)..... 8

State v. Bennett, 503 N.W.2d 42 (Iowa Ct. App. 1997)..... 5

State v. McCall, 754 N.W.2d 868, 871 (Iowa App. 2008) ..... 7

Waits v. United Fire & Cas. Co., 572 N.W.2d 565 (Iowa 1997) ..... 8

**Statutes / Rules of Court**

Iowa Code § 668.3(5) ..... 10

Iowa R. of Civ. P. 1.925..... 8

Iowa R. App. P. 6.1103(1)(b) ..... 4, 5

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The trial court responded to the questions of the jury appropriately and within the scope of its discretion.

## **DISAGREEMENT WITH STATEMENT SUPPORTING FURTHER REVIEW**

Dr. Mileris disagrees with Ms. Mumm's Statement Supporting Further Review. Plaintiff / Appellant Mandi Mumm has failed to show good cause for this Court to exercise its discretion to grant further review. *See* Iowa R. App. P. 6.1103(1)(b); Mumm v. Jennie Edmundson Memorial Hospital, 2018 WL 4923164, \*1 (Iowa Ct.App.).

No constitutional question is presented. Ms. Mumm has not identified a question of law that is undecided. *See* Iowa R. App. P. 6.1103(1)(b)(2). To the contrary, the discretion of the Trial Court in responding to juror questions, and the standard of review, are well-settled.

Nor is there a "question of changing legal principles." *See* Iowa R. App. P. 6.1103(1)(b)(3). Ms. Mumm does not take issue with the relevant legal principles, only with their application to her case by both the Trial Court and the Court of Appeals. Nor is this a case of broad public importance. *See* Iowa R. App. P. 6.1103(1)(b)(4). Rather, it involves the application of

decided law to a certain set of facts which are of importance chiefly to the litigants in this case.

Ms. Mumm has not shown a genuine conflict with other decisions of the Iowa appellate courts. *See* Iowa R. App. P. 6.1103(1)(b)(1). Responses to jury questions are within the discretion of the Trial Court. Necessarily, the cases are fact-specific, as are the decisions. Ms. Mumm has not pointed to an actual conflict between Mumm and other decisions, based on different factual scenarios. Further, the legal principles applied are consistent in Mumm, Rule 1.925, and other cases.

Ms. Mumm argues there is a conflict between the Court of appeals decision and case law. The cases she cited are not in conflict with Mumm; they are different. (Appellant's Brief, pp. 6-7) For example, a criminal case cited involved the jury instructions given. State v. Bennett, 503 N.W.2d 42 (Iowa 1993). Similarly, two other cases involved jury instructions. Haskenhoff v. Homeland Energy Solutions, LLC, 897 N.W.2d 553 (Iowa 2017) (criticizing jury instructions which "omitted central element" of claim and "was material misstatement of law"); Rivera v. Woodward Resource Center, 865 N. W.2d 887 (Iowa 2015) (finding giving of erroneous jury instruction on causation was harmless error). *See also* Deboom v. Raining

Rose, Inc., 772 N.W.2d 1 (Iowa 2009) (discussing failure to give required jury instruction).

Nothing other than the speculation of Plaintiff's counsel supports the contention that the jury was confused or did not understand their verdict and the effect it would have on damages. To the contrary, the jury rendered a unanimous verdict finding Dr. Mileris was not negligent. (App. pp. 52-54) There was then no issue of comparing fault, since Dr. Mileris was not at fault, or of awarding damages, since Ms. Mumm was not entitled to them.

#### **DISAGREEMENT WITH STATEMENT OF THE FACTS**

Dr. Mileris disagrees with the Statement of Facts of Ms. Mumm. Specifically, Dr. Mileris takes issue with the assertion that Dr. Mileris, or the hospital where he worked (Co-Defendant Jennie Edmundson Memorial Hospital) were negligent or failed to timely diagnose and treat Ms. Mumm. Dr. Mileris consistently has denied any negligence on his part. Any assertion that Dr. Mileris was negligent contradicts the jury verdict. The jury found as follows:

**QUESTION NO. 1:** Was Dr. Paul Mileris negligent?

Answer: **No.**

(App. p. 52)

During deliberations, the jury submitted two written questions to the Trial Court. The first question gave hypothetical allocations of fault between CH, Inc. and Dr. Mileris, then asked what the effect of those allocations would be. The second question was why CH, Inc. was still in the lawsuit since it had been released. (App. p. 55) The Trial Court responded by directing the jury to follow the jury instructions based on the evidence from the trial. (App. p. 55)

The jury continued its deliberations and no further questions were asked. A unanimous verdict was returned in favor of Dr. Mileris and all other Defendants. (App. pp. 52-54)

## ARGUMENT

### **THE TRIAL COURT RESPONDED TO THE QUESTIONS OF THE JURY APPROPRIATELY AND WITHIN THE SCOPE OF ITS DISCRETION.**

Ms. Mumm's appeal of the jury verdict in favor of Dr. Mileris dealt solely with whether the Trial Court should have further instructed the jury when it posed questions to the Trial Court during its deliberations. The decision of the Trial Court "to give a supplemental instruction, or to refrain from doing so, rests within the sound discretion" of the Trial Court. State v. McCall, 754 N.W.2d 868, 871 (Iowa App. 2008). The language of Iowa R.

Civ. P. 1.925 makes it clear that providing further instructions to the jury is discretionary:

While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record and any objections thereto shall be made in a motion for a new trial.

Iowa R. of Civ. P. 1.925.

Appellate review is for an abuse of discretion. Mumm v. Jennie Edmundson Memorial Hospital, 2018 WL 4923164, \*1 (Iowa Ct.App.) (citing Iowa R. Civ. P. 1.925; McConnell v. Aluminum Co. Of America, 367 N.W.2d 245, 250 (Iowa 1985)). As to that discretion:

An abuse of discretion occurs when "the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.

Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000) (emphasis added) (quoting Waits v. United Fire & Cas. Co., 572 N.W.2d 565, 569 (Iowa 1997)). The Trial Court was presented with juror questions. The response



was a common one: “Please follow the instructions already given to you based upon the evidence presented in trial.” (App. p. 55) The “jury is presumed to follow the court's instructions.” Schwennen v. Abell, 471 N.W.2d 880, 887 (Iowa 1991) (citing Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 110 (Iowa 1986)). The jury asked no further questions, so presumably the jury re-read, and followed, the instructions given.

Ms. Mumm has not challenged on appeal the main set of jury instructions which were given, so they are presumed to have been proper. Huff v. Aulman, 28 N.W. 440, 442 (Iowa 1886) (noting “[w]e will presume, in the absence of any showing to the contrary, that the jury were properly instructed”). The jury instructions given were not the subject of Ms. Mumm’s appeal. Ms. Mumm’s argument that it was an abuse of discretion – *i.e.*, “clearly untenable” or “clearly unreasonable” -- for the Trial Court to direct the jury to follow the jury instructions from which Ms. Mumm did not appeal should fail in this Court, as it has in the Trial Court and the Court of Appeals.

As noted by the Court of Appeals, Ms. Mumm appealed the denial of her Motion for New Trial. Appellate review was based on the reasons cited in Ms. Mumm’s Motion, which “was based on the trial court’s response to questions received from the jury.” Mumm, at \*2. The Court of Appeals found no abuse of discretion in the responses given by the Trial Court to the jury’s

questions. It is only that decision from which Ms. Mumm may seek further review.

In this Application for Further Review, Ms. Mumm argues that further instruction was required, because the written jury instructions which were given were not clear. Ms. Mumm goes beyond the scope of the Court of Appeals decision, in essence challenging the jury instructions themselves. Ms. Mumm argues that the jury instructions given must convey the applicable law so that the jury has a clear understanding of what it must decide. (Appellant's Brief, p. 13) She argues that the Trial Court was required to inform the jury about comparative fault. Id. (citing Iowa Code § 668.3(5)) (discussing jury instructions, and evidence and argument during trial). However, the instructions given was not the basis upon which Ms. Mumm appealed. As the dissent noted in Mumm, "Iowa Code section 668.3(5) was not raised or argued on appeal." Mumm, at \*6, n.1. Further Review should not be granted on the basis of a roundabout challenge to the jury instructions given, when no appeal was taken based on those jury instructions.

Ms. Mumm's Application for Further Review cleaves to the dissenting opinion in Mumm, which discussed Iowa Civil jury Instruction 400.3 and the comments thereto, Iowa Code § 668.3(5), and rules applicable to jury instructions, among other things. However, the issue appealed by Ms. Mumm

involved a discretionary instruction given by the Trial Court. There are no requirements as to giving a further instruction. It is left to the discretion of the Trial Court. It is not grounds for appeal unless it is given “for reasons clearly untenable or to an extent clearly unreasonable.” Graber, 616 N.W.2d at 638. The Court of Appeals considered that issue, and found no abuse of discretion. Further review should be denied.

### **CONCLUSION**

Ms. Mumm has not demonstrated a basis for reversing the previous decisions denying her Motion for New Trial. Defendants-Appellees Emergency Physicians of Western Iowa, L.L.C. and Paul Mileris, M.D. request that the decision of the Trial Court denying a new trial and the decision of the Iowa Court of Appeals affirming the decision of the Trial Court be affirmed by this Court, and the jury verdict in favor of Defendants be allowed to stand.

### **REQUEST FOR ORAL ARGUMENT**

Defendants-Appellees Emergency Physicians of Western Iowa, L.L.C. and Paul Mileris, M.D. hereby request to be heard in oral argument on this Resistance to Application for Further Review.

/s/ Mary M. Schott  
Mary M. Schott, #AT0006979

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1,651 words, including the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman font.

November 5, 2018  
Date

/s/ Mary M. Schott  
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**ATTORNEY'S COST CERTIFICATE**

I, Mary M. Schott, attorney for the Defendants-Appellees, hereby certifies that the actual cost of reproducing the necessary copies of the preceding Proof Brief was \$0.00.

/s/ Mary M. Schott  
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**CERTIFICATE OF FILING / SERVICE**

The undersigned hereby certifies that on the 5th day of November, 2018, the above and foregoing document was e-filed with the Clerk of the Iowa Supreme Court, which will send a true and correct copy of same to the following:

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IN THE IOWA DISTRICT COURT FOR POTTAWATTAMIE COUNTY

<p>MANDI MUMM,  Plaintiff,  vs.  CH, INC. &amp; SIDNEY STRNAD, and JENNIE EDMUNDSON MEMORIAL HOSPITAL d/b/a METHODIST JENNIE EDMUNDSON HOSPITAL, EMERGENCY PHYSICIANS OF WESTERN IOWA, L.L.C. and PAUL C. MILERIS, M.D.,  Defendants.</p>	<p>LACV 113851</p> <p>2011 SEP -8 PM 3:56 FILED IOWA DISTRICT COURT POTTAWATTAMIE COUNTY IOWA</p> <p>VERDICT FORM AND SPECIAL INTERROGATORIES</p>
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We find the following verdict on the questions submitted to us:

**QUESTION NO. 1:** Was Dr. Paul Mileris negligent?

Answer "yes" or "no."

ANSWER: No

[If your answer is "no," do not answer any of the following questions.]

**QUESTION NO. 2:** Was the negligence of Dr. Paul Mileris a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER: \_\_\_\_\_

[If your answer to either Question No. 1 or No. 2 is "no," then you shall not assign any fault to Dr. Paul Mileris, and you will not answer any further questions.]

If the answer to both Questions 1 and 2 are yes, then you will answer the following questions.

**QUESTION NO. 3:** Was CH, Inc., negligent?

Answer "yes" or "no."

ANSWER: \_\_\_\_\_

[If your answer is "no," do not answer Question No. 4.]

*Copy Ruth*

**QUESTION NO. 4:** Was the negligence of CH, Inc., a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER: \_\_\_\_\_

[If your answer to either Question No. 3 or No. 4 is "no," then you shall not assign any fault to CH, Inc.]

**QUESTION NO. 5:** What percentage of the total fault do you attribute to Defendant, Dr. Paul Mileris and what percentage of the total fault do you attribute to CH, Inc.? The percentages must total 100%.

[If you previously found that Defendant Dr. Paul Mileris or CH, Inc., was not at fault, or did not cause damage to Plaintiff, then enter "0" after its name.]

ANSWER:

Dr. Paul Mileris \_\_\_\_\_ %

CH, Inc. \_\_\_\_\_ %

TOTAL: 100%

**QUESTION NO. 6:** State the amount of damages sustained by Plaintiff caused by a defendant's fault as to each of the following items of damage. If Plaintiff has failed to prove any item of damage, or has failed to prove that any item of damage was caused by a defendant's fault, enter 0 for that item.

1. Future medical expenses \$ \_\_\_\_\_

2. Loss of future earning capacity \$ \_\_\_\_\_

3. Loss of function of the body in the past \$ \_\_\_\_\_

4. Loss of function of the body in the future \$ \_\_\_\_\_

5. Past pain and suffering \$ \_\_\_\_\_

6. Future pain and suffering \$ \_\_\_\_\_

TOTAL (add the separate items of damage): \$ \_\_\_\_\_

**QUESTION NO. 7:** For each of the following elements of damage, state the amount which you find Defendants have proven has been or will be replaced or paid by insurance, or by governmental, employment, or service benefit programs, or from any other source except the assets of Plaintiff. If Defendants have failed to prove that any item of damage will be replaced or paid by a source other than the assets of Plaintiff, enter 0 for that item.

1.	Future medical expenses	\$ _____
2.	Loss of future earning capacity	\$ _____
	TOTAL (add the separate items of damage):	\$ _____

Rebecca Vanier  
FOREPERSON\*

\* To be signed only if verdict is unanimous

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\_\_\_\_\_  
Juror\*\*

\*\* To be signed by the jurors agreeing thereto after six hours or more of deliberation.